

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

JEFF GRUVER,

Plaintiff,

v.

LESMAN FISHERIES INC., BOB
LESMAN; and F/V SUNSET CHARGE,
Official Number 534685, *in rem*,

Defendants.

Case No. C04-5428RJB

ORDER

This matter comes before the court on defendant's Motion and Memorandum for Summary Judgment Dismissing In Rem Claim (Dkt. 37), and on Plaintiff's Motion for an Order Declaring that Punitive Damages Against the Master of a Different Vessel are Theoretically Available as a Matter of Law for Intentional Assault (Dkt. 36). The court has considered the pleadings filed in support of and in opposition to the motions and the file herein.

On June 22, 2004, plaintiff filed a complaint for damages pursuant to admiralty and maritime law, 28 U.S.C. § 1333 and 46 U.S.C. § 10601, and 45 U.S.C. § 56. The complaint arises out of a an altercation involving plaintiff and Bob Lesman, owner of the F/V Sunset Charge, that allegedly resulted in injuries to plaintiff. Plaintiff alleges claims for negligence, and for wages wilfully withheld while plaintiff worked as a seaman aboard the F/V Sunset Charge. Dkt. 1. The complaint requests damages against Mr. Lesman personally, against Lesman Fisheries, Inc., and against F/V Sunset

1 Charge in rem. *Id.* On June 20, 2005, pursuant to the stipulation of the parties, the court dismissed all
2 claims for wages. Dkt. 41.

3 The parties have stipulated that the claim related to the altercation between plaintiff and Mr.
4 Lesman is asserted *in rem* under the general maritime law for negligence; and that the complaint does
5 not assert any claims against any defendant for unseaworthiness or for negligence under the Jones Act,
6 46 U.S.C. § 688. Dkt. 38, Exh. 1, at 2-3.

7 Defendants have now filed a motion for summary judgment (Dkt. 37), and plaintiff has filed a
8 motion requesting that the court find that punitive damages are theoretically available for intentional
9 assault (Dkt. 36).

10 11 **1. Defendants' Motion for Summary Judgment Dismissing In Rem Claim**

12 **Motion.** On June 7, 2005, defendants filed a motion for summary judgment, requesting that
13 the court dismiss the *in rem* claim in this action. Dkt. 37. Defendants contend that the *in rem* claim
14 for negligence against the F/V Sunset Charge arises entirely out of an alleged assault by Mr. Lesman;
15 at the time of the alleged assault, neither Mr. Lesman nor the corporate defendant had an
16 employer/employee relationship to plaintiff; the alleged assault occurred on a vessel unrelated to Mr.
17 Lesman and Lesman Fisheries, Inc.; and at the time of the alleged assault, plaintiff worked for the F/V
18 Adventurous. Because they contend that the assault in this case is not attributable to the vessel,
19 defendants request that the court dismiss the *in rem* claim.

20 In response to defendants' motion, plaintiff argues that the assault stemmed from a wage
21 dispute, and that the record does not support Mr. Lesman's claim that he went aboard the F/V
22 Adventurous to give plaintiff \$100 check. Dkt. 42.

23 In reply, defendants contend that no offending conduct by the vessel gave rise to plaintiff's
24 injuries because plaintiff was not employed by defendants at the time he was assaulted and he was not
25 assaulted aboard the F/V Sunset Charge. Dkt. 47. Defendants further contend that plaintiff has not
26 shown that, at the time of the alleged assault, Mr. Lesman was acting on behalf of or to further the
27 interests of the F/V Sunset Charge. *Id.* Finally, defendants argue that plaintiff has not produced
28 sufficient probative evidence to support his claim that the assault arose out of a wage dispute. *Id.*

Summary Judgment Standard. Summary judgment is proper only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the non moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)(nonmoving party must present specific, significant probative evidence, not simply “some metaphysical doubt.”). *See also* Fed.R.Civ.P. 56(e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 .S. 242, 253 (1986); *T.W. Elec. Service Inc. v. Pacific Electrical Contractors Association*, 809 F.2d 626, 630 (9th Cir. 1987).

The determination of the existence of a material fact is often a close question. The court must consider the substantive evidentiary burden that the nonmoving party must meet at trial – e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254, *T.W. Elect. Service Inc.*, 809 F.2d at 630. The court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party’s evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elect. Service Inc.*, 809 F.2d at 630 (relying on *Anderson, supra*). Conclusory, non specific statements in affidavits are not sufficient, and “missing facts” will not be “presumed.” *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888-89 (1990).

Relevant Facts. The parties have stipulated to the following facts:

1. During the month of May, plaintiff was employed by Lesman Fisheries, Inc. aboard the vessel SUNSET CHARGE. During that time, his direct supervisor and captain of the SUNSET CHARGE was Bob Lesman.
2. In early June 2004, Jeff Gruver voluntarily discontinued his employment for Lesman Fisheries, inc. aboard the SUNSET CHARGE. He so advised Bob Lesman. At that time, Mr.

1 Gruver took employment aboard the fishing vessel ADVENTUROUS.

2 3. The fishing vessel ADVENTUROUS is not owned or operated by Lesman Fisheries, Inc.
3 Neither Bob Lesman nor Lesman Fisheries, Inc. has any legal or other connection to the fishing
4 vessel ADVENTUROUS of any kind.

5 4. At the time Mr. Gruver left the employment of Lesman Fisheries, Inc., he was owed some
6 amount of money in wages.

7 5. Plaintiff alleges that on June 18, 2004, Bob Lesman, as an individual, and on behalf of
8 Lesman Fisheries, Inc., assaulted Mr. Gruver. Further, Mr. Gruver contends that the assault
9 committed by Bob Lesman was committed on behalf of Lesman Fisheries, Inc. Mr. Gruver
10 alleges that the assault committed by Bob Lesman was both negligent and intentional.

11 6. At the time of the assault alleged by Mr. Gruver, he was no longer employed by Lesman
12 Fisheries, Inc. or aboard the fishing vessel SUNSET CHARGE.

13 7. At the time of the alleged assault on June 18, 2004, neither Mr. Lesman nor Mr. Gruver
14 were aboard the fishing vessel SUNSET CHARGE.

15 8. At the time of the alleged assault on June 18, 2004, Bob Lesman and Jeff Gruver were not
16 fellow crewmembers, crewmates, or otherwise affiliated by any business or other relationship.

17 Dkt. 38, Exh. 1, at 1-2.

18 Defendants contend that, when plaintiff quit his job with Mr. Lesman on June 5, 2004, Mr.
19 Lesman paid him by check; that plaintiff later met Mr. Lesman on the dock, told Mr. Lesman that he
20 owed him more money and wanted to be paid, and threatened him; that Mr. Lesman had not paid
21 plaintiff because he had not been paid for the catch obtained while plaintiff was working for him; and
22 that Mr. Lesman mailed a check for \$203.44 to plaintiff on June 5, 2004. Dkt. 38, Exh. 2, at 2.

23 On June 11, 2004, plaintiff telephoned Mr. Lesman at his home and left the following message
24 on the answering machine:

25 Yeah Lesman, this is Jeff Gruver. You want to try me, ok. I've been waiting all week for my
26 check and it never showed up at my house. I'm not playing games, ok. My girls just got an
27 eviction notice and I'm fucking pissed off at you. Ok, you want to try me, I'll get the Marshal
28 to tie up your fucking boat. You don't want to fuck with me ok. You don't know me but
nobody's not paid me in twenty-five years. I'm fucking crazy ok. You got a lot of nice shit.
You want me to fuck your shit up? You best be giving me my money and don't give me that
get on the dock fight shit because I will fight you and I will hurt you because I am not scared
of you a bit. You best have my fucking paycheck. I am not fucking around any more. If you
don't give me my fucking paycheck before I leave this fucking town I'll fuck you over 24/7
buddy. I want my fucking check now. I will see you when you get into town.

See Dkt. 38, Exh. 4, at 2.

On June 12, 2004, the \$203.44 check was delivered to plaintiff's Oregon address. See Dkt.
38, Exh. 4. Plaintiff left another voice mail on that date on Mr. Lesman's answering machine.

1 Yeah Lesman, I got your check. I'm playin at the Lucky Eagle here. I got that statement here
 2 and you told me that I was getting 10% off the top with no fuel off the top. You only paid me
 3 9% and charged me \$10 a day for living on the boat. You clipped me a hundred bucks here. I
 4 don't think you want to make an enemy for a few hundred bucks. It's not worth it. You don't
 know what I am capable of. So I think you best get me the rest of my money to me or we will
 part on fucking bad terms, alright. I will be looking forward to getting what you owe, alright.
 So pay up. Bye.

5 See Dkt. 38, Exh. 4, at 2.

6 The parties' versions of the events diverge from there. Plaintiff contends that he was lying on
 7 his bunk on the F/V Adventurous, about 1 a.m. on June 18, 2004, waiting for the skipper to arrive,
 8 when he saw Mr. Lesman and another man come on board the vessel. Plaintiff stated that both of the
 9 men charged up to his bunk; that he told the men to get off the boat; and that they trapped him in the
 10 bunk and assaulted him.

11 Mr. Lesman, on the other hand, stated that he went to the F/V Adventurous with a check in his
 12 hand to meet plaintiff's demand for more money, intending to tell plaintiff to stop leaving voice mail
 13 messages, to stop threatening him, and to leave him alone. Dkt. 38, Exh. 2, at 3. Mr. Lesman stated
 14 that "[w]hen I went aboard the ADVENTUROUS to give Mr. Gruver his check and tell him not to be
 15 in contact with me or my family in any way, he attacked me and I defended myself." *Id.*

16 In his deposition, Mr. Lesman testified as follows:

17 A. Well, I went down to the ADVENTURESS a couple of time earlier that day, looking for
 18 Gruver, because I came in from fishing, and I had got a couple of nasty messages on my home
 answering machine. I guess you listened to those today.

19 So anyway, I wasn't too happy about that, so I went down to find out what his big
 gripe was. And he flat-out attacked me when I jumped on the boat, you know. And we just
 went at it.

20 Dkt. 43, Exh. A., at 13.

21 * * * * *

22 Q. [By Mr. Merriam] Now, tell me—you might have mentioned this, but explain further, if you
 23 will, tell me exactly what you had in mind when you went looking for Jeff Gruver.

24 A. I just wondered why he was threatening me on my telephone. You know, he's telling me
 he's crazy. He's going to wreck my stuff.

25 You know, I spend a lot of time with my grandson, and no way I would ever want to
 26 get jumped by him when I have my little grandson with me. And I wanted to go down there
 and straighten this matter out before I got jumped when I wasn't looking, especially with my
 27 five-year-old grandson.

28 Q. So what did you think would happen when you went aboard the ADVENTURESS and
 confronted Jeff Gruver with this?

1 A. I really didn't know, but I wasn't very happy about those phone calls either, and I could tell
2 he wasn't very happy either, you know. But I figured we could work something out.

3 And he went bananas right away. I don't know if he was on meth or drunk or what he
4 was, but he was not very good in his mind, I don't think. He's pretty wild.

5 Q. So you went aboard the ADVENTURESS to talk to him?

6 A. Yeah.

7 Dkt. 43, Exh. A, at 16-17.

8 **Discussion.** In this motion for summary judgment, the court has construed facts in plaintiff's
9 favor. For purposes of the motion for summary judgment only, the relevant facts are as follows:
10 previous to the alleged assault, plaintiff had been employed to work on the F/V Sunset Charge;
11 plaintiff's employment with the F/V Sunset Charge had terminated by the time of the alleged assault;
12 Mr. Lesman owed plaintiff wages for his work on the F/V Sunset Charge; before the day of the alleged
13 assault, plaintiff had confronted Mr. Lesman personally about the amount of the wages that he had
14 been paid; plaintiff left two voice mail messages on Mr. Lesman's phone, that could, taken in the best
15 light for plaintiff, be described as confrontational; plaintiff was not on the F/V Sunset Charge at the
16 time of the alleged assault, but was on board the vessel with which he was engaged at the time; Mr.
17 Lesman went to the vessel with his nephew; and Mr. Lesman assaulted plaintiff.

18 Under Rule C of the Supplemental Admiralty Rules, a party may only proceed *in rem* under
19 two circumstances: (1) pursuant to federal statute, or (2) by establishing the existence of a maritime
20 lien. 28 U.S.C. § 723; *see also Trueman v. The Historic Steamtug New York*, 120 F.Supp.2d 228, 230
21 (N.D.N.Y. 2000). Since no federal statute is at issue in this case, plaintiff's *in rem* claim against the
22 F/V Sunset Charge can only be maintained if he can establish the existence of a maritime lien.

23 "A maritime lien is a privileged claim upon maritime property, such as a vessel, arising out of
24 services rendered to or injuries caused by that property....The theoretical basis of the maritime lien
25 goes to the heart of all that is distinctive about admiralty law: it is a right based upon the legal fiction
26 that the ship is the wrongdoer--the ship itself caused the loss and can be called to the bar to make
27 good the loss." Schoenbaum, Admiralty and Maritime Law, § 9-1 (4th ed. 2004). The ship, as an
28 entity considered apart from the personal liability of the owner, becomes responsible for benefits
conferred and damages committed by the ship. *Todd Shipyards Cor. v. City of Athens*, 83 F.Supp. 67,
75 (D.C. Md. 1949).

1 As maritime law developed, courts permitted actions *in rem* against a vessel to enforce
2 maritime liens for nearly all maritime torts, including personal injury, with the exception that no action
3 *in rem* could be brought for negligence when a seaman's injuries resulted from an assault. See *The*
4 *ANCES*, 93 F.240 (4th Cir. 1899); *Trueman v. The Historic Steamtug New York*, 120 F.Supp. 2d 228,
5 230 (N.D.N.Y. 2000); *Stewart v. Steamer Blue Trader*, 428 F.2d 361, 363 (1st Cir. 1970).

6 Exceptions to the rule, however, permitted *in rem* actions based upon assault to proceed under
7 various theories of maritime law. For example, in *The Rolph*, 293 Fed. 269, *aff'd* 299 F.3d 52 (9th Cir.
8 1923), a seaman was permitted to sue *in rem* when he was beaten by a fellow crewmember so
9 viciously as to render the vessel unseaworthy. In *The David Evans*, 187 F. 775 (D.Hawaii 1911), a
10 seaman was permitted to sue *in rem* when he was beaten by the vessel master, on the theory that the
11 beating was a breach of the obligation under the shipping articles to treat the seaman with proper
12 kindness. In *The Marion Chilcott*, 95 F. 688, 689 (D.Wash. 1899), an *in rem* action was allowed
13 where the plaintiff was repeatedly assaulted by a subordinate officer. All of these actions appear to
14 have been based upon the special duty of the master to protect seamen related to their employment on
15 the vessel.

16 However, in *Stewart v. Steamer Blue Trader*, 428 F.2d 361, 363 (1st Cir. 1970), an *in rem*
17 action was not permitted to proceed when the person injured in an assault on board a vessel was not a
18 seaman on that vessel. In *Stewart*, the First Circuit declined to allow a tavern patron to maintain an *in*
19 *rem* action based upon a claim for negligence, when the alleged assault was committed on board the
20 vessel by an inebriated seaman who was in the employ of the vessel, after the seaman had invited the
21 tavern patron to the vessel.

22 In this case, plaintiff claims that he was a seaman and was owed wages from his employment
23 on the F/V Sunset Charge; these facts point to some connection between plaintiff, his employment on
24 the vessel, and the wages owed to him. Defendants argue that, because plaintiff was no longer in the
25 employ of the vessel and because the alleged assault did not occur on board the F/V Sunset Charge,
26 plaintiff cannot maintain an action *in rem* against the vessel. Defendants further maintain that the
27 alleged assault did not arise out of a wage dispute, but instead was the result of Mr. Lesman
28 responding to plaintiff's threatening behavior, in person and by phone message.

1 In the context of maritime law, seamen have long been considered to be wards of the court,
2 and great deference has been afforded to them in protecting and liberally construing their rights. *See*
3 *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 91-92 n. 9 (1946); *U.S. Bulk Carriers, Inc. v. Arguelles*,
4 400 U.S. 351, 355 (1971). Nonetheless, the cases indicate that, in order for a plaintiff to enforce a
5 maritime lien against the vessel based upon an assault, there must be some nexus between the alleged
6 assault, the parties involved in the alleged assault, and the ship, sufficient for the ship to be considered
7 to have caused the loss.

8 The court has carefully reviewed the record. Because so many disputed issues of material fact
9 are unresolved, the court cannot rule as a matter of law whether the plaintiff is entitled to pursue an
10 action *in rem* against the vessel. Courts have not established a bright line rule, as defendants suggest,
11 that requires an alleged assault to be on board the vessel at the time of the alleged assault, nor has a
12 line been drawn that requires that a former seaman owed wages may not sue *in rem*. Further, the
13 court cannot at this point determine what the parties' motivations and intentions were when the
14 alleged assault occurred. In order for the court to determine whether there is a sufficient nexus
15 between the alleged assault, the parties involved, and the ship to hold the ship liable *in rem*, the
16 disputed facts, which are largely issues of credibility, will need to be determined.

17 Accordingly, defendants' motion for summary judgment dismissing the *in rem* claim should be
18 denied, but defendants are not precluded from raising the issue at an appropriate time.

19
20 **2. Plaintiff's Motion for an Order Declaring that Punitive Damages Against the Master**
21 **of a Different Vessel are Theoretically Available as a Matter of Law for Intentional**
22 **Assault**

23 **Motion.** Plaintiff brought this action under 42 U.S.C. § 1333, 46 U.S.C. § 10602 and the
24 general maritime law. Dkt. 28, at 1. The claim for wages under 46 U.S.C. § 10602 has been
25 dismissed. In the amended complaint, plaintiff seeks punitive damages in addition to general damages.
26 *Id.* at 4.

27 On June 7, 2005, plaintiff filed a motion, requesting that, in the event the *in rem* claims based
28 upon assault are dismissed, the court determine that plaintiff may assert a punitive damages claim

1 against Mr. Lesman based upon the assault. Plaintiff alleges that, if the court determines that there is
2 not an employment relationship between plaintiff and Mr. Lesman to establish an *in rem* claim,
3 punitive damages should be available to him.

4 Defendants contend that punitive damages are not available in this maritime action, whether an
5 employment relationship existed at the time of the alleged assault or not.

6 In his reply, plaintiff argues that, if the *in rem* claim is dismissed by the court, he can no longer
7 be considered a seaman in the employ of Mr. Lesman, and therefore he is no different from any other
8 individual who is intentionally assaulted aboard a vessel. Dkt. 46.

9 **Discussion.**

10 The Jones Act precludes a seaman from recovering punitive damages. 46 U.S.C.A. § 688;
11 *Kopczynski v. The Jacqueline*, 742 F.2d 555, 560-61 (9th Cir. 1984). Under the Supreme Court's
12 decision in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), a seaman is precluded from using a
13 maritime law claim to recover damages that would be unavailable under the Jones Act. In *Miles v.*
14 *Apex Marine Corp.*, the Supreme Court concluded that a decedent's mother could not recover
15 damages for loss of society under the Jones Act and the Death on the High Seas Act.

16 The Jones Act also precludes recovery for loss of society in this case involving a general
17 maritime claim for wrongful death resulting from unseaworthiness, since it would be
18 inconsistent with this Court's place in the constitutional scheme to sanction more expansive
19 remedies for the judicially created unseaworthiness cause of action, in which liability is without
20 fault, than Congress has allowed in cases of death resulting from negligence. This holding
21 restores a uniform rule applicable to all actions for the wrongful death of a seaman, whether
22 under DOHSA, the Jones Act, or general maritime law.

23 *Miles v. Apex Marine Corp.*, 498 U.S. at 20.

24 Further, in *Scarborough v. Clemco*, 391 F.3d 660, 668 (5th Cir. 2004), the Fifth Circuit
25 determined that *Miles v. Apex Marine Corp.*, *supra*, precludes seamen from obtaining punitive
26 damages against a third party defendant who is not the seaman's employer. *Id.*

27 Accordingly, punitive damages are unavailable to seamen for claims under the Jones Act. To
28 the extent that plaintiff can be considered a seaman, in the interest of uniform application of maritime
law, punitive damages are unavailable in a case such as this, where the claims based on assault are
brought pursuant to general maritime law.

Plaintiff argues, however, that, if the court dismisses the *in rem* claim against the F/V Sunset

1 Charge, he should be permitted to pursue punitive damages. Plaintiff's theory is that he would not be
2 a seaman because no employment relationship existed between him and Mr. Lesman at the time of the
3 alleged assault, and he should be permitted to sue for punitive damages as would any other third party.
4 Some courts have held that punitive damages are available to passengers aboard vessels. *In re*
5 *Horizon Cruises*, 101 F.Supp.2d 204 (S.D.N.Y. 2000), the district court distinguished *Miles* and
6 concluded that punitive damages were available for non seaman passengers on a cruise line. *See*
7 *Horizon Cruises*, 101 F.Supp. 2d at 210, *citing* David W. Robertson, Punitive Damages in American
8 Maritime Law, 28 J. Mar. L. & Com. 73, 90 n. 79 (1997) ("From very early times the common law
9 had held that the carrier-passenger relationship entailed special solicitude for passengers and required
10 the highest degree of care from carriers.").

11 At this point, a determination whether plaintiff could be characterized as a seaman or in some
12 other status depends on development of the facts involving the nexus between the assault, the parties,
13 and each of the two vessels. A decision on whether plaintiff can state a claim for punitive damages is
14 premature. Plaintiff's motion for an order declaring that punitive damages are available against Mr.
15 Lesman should be denied without prejudice to raise the issue at an appropriate time during the trial.

16 **The court questions whether maritime law applies to this case and, if not, whether this**
17 **court has jurisdiction. The parties should be prepared to discuss this issue at the pretrial**
18 **conference.**

19 Therefore, it is hereby

20 **ORDERED** that defendant's Motion and Memorandum for Summary Judgment Dismissing In
21 Rem Claim (Dkt. 37) is **DENIED WITHOUT PREJUDICE**. Plaintiff's Motion for an Order
22 Declaring that Punitive Damages Against the Master of a Different Vessel are Theoretically Available
23 as a Matter of Law for Intentional Assault (Dkt. 36) is **DENIED WITHOUT PREJUDICE**.

24 The Clerk is directed to send uncertified copies of this Order to all counsel of record and to
25 any party appearing *pro se* at said party's last known address.

26 DATED this 5th day of July, 2005.

27 /s/ Robert J. Bryan
28 ROBERT J. BRYAN
U.S. DISTRICT JUDGE